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# APPENDIX TO BRIEF FOR PLAINTIFFS IN ERROR.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

## No. 171.

A. Y. CHRISMAN ET AL., PLAINTIFFS IN ERROR,

*vs.*

E. O. MILLER ET AL.

**CERTIFIED COPY OF ARGUMENT OF MR. METSON ON BEHALF OF APPELLANTS IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.**

JOSEPH C. CAMPBELL,
WILLIAM H. METSON,
FRANK C. DREW,
*Attorneys for Plaintiffs in Error.*

PHILIP MANSFIELD,
*Of Counsel.*

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San Francisco, No. 2242.

IN THE

# SUPREME COURT

OF THE

# STATE OF CALIFORNIA.

E. O. MILLER and THE HOME OIL COMPANY, a corporation,

*Plaintiffs and Respondents,*

vs.

A. Y. CHRISMAN and H. T. CHRISMAN,

*Defendants and Appellants.*

J. W. FEWEL,

*Intervenor and Appellant.*

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## Argument of Mr. Metson

## ON BEHALF OF APPELLANTS.

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*REDDY, CAMPBELL & METSON,*
*AUSTIN & JONES,*
*W. R. McQUIDDY,*
Attorneys for Defendants and Appellants.

*Filed this.....day of March, 1903.*

*FRANK JORDAN, Clerk.*

*By..... .....Deputy Clerk.*

**(Endorsed.)**

*Filed March 3, 1903.*

*FRANK C. JORDAN, Clerk.*
*By J. C. CROOKS, Deputy.*

IN THE

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OF THE

STATE OF CALIFORNIA.

E. O. MILLER ET AL.,
*Plaintiffs and Respondents,*

vs.

A. Y. CHRISMAN ET AL.,
*Defendants and Appellants.*

} IN BANK

SAN FRANCISCO, CAL., Feb. 4, 1903.

## ARGUMENT ON BEHALF OF APPELLANTS.

MR. METSON. In this case, may it please the court, there are two plaintiffs, Miller, and the Home Oil Company, lessees under the Miller title. The defendants are A. Y. Chrisman and H. T. Chrisman, father and son, each claiming a separate twenty acre tract out of a certain northeast quarter of section 20—160 acres. There was an intervention as to a certain other twenty acre tract of the 160 acre tract in behalf of one Fewel. Judgment went in the lower court in favor of the plaintiffs and against the defendants and against the intervenor, and the appellants here are the intervenor and the defendants. The complaint

was filed in the nature of a suit to quiet title, alleging that the defendants claimed the two twenty-acre tracts out of the 160, and at the time of the trial the intervention of Fewel was allowed.

MR. JUSTICE McFARLAND. Was this case ever decided in Department?

MR. METSON. No, your Honor, it was not decided. It was argued in Department and then sent to the court in bank. Now, with reference to the history of the 160 acre tract and the point in issue, the defendants claim that there was no valid location by Miller and his associates, they being eight in all, claiming 160 acres under the Mineral Land Act and the act of 1897 with reference to petroleum. Now, I take it that the case will resolve itself into a question of proper locations, and into the question as to whether a person can enter upon invalid locations and make a valid location; in other words, will there be a possession under an invalid location, no one being on the ground or in the neighborhood, and will it be good as against every one but the United States?

Sec. 355, Vol. 1, Snyder on Mines;

Gwellam v. Donellan, 115 U. S., 45.

MR. JUSTICE McFARLAND. Let me say one thing. I believe it is conceded by counsel on both sides that the location of oil claims is governed by the law as to the location of placer mining claims.

MR. METSON. We think that is correct, and I believe the other side agree with us on that proposition. Under the Act of 1897 of Congress that was put out of question. Now, as to the question of possession: As I understand it, in some of these oil cases that have been tried in the Federal courts the point was made with reference to certain parties attempting to scrip lands that had been theretofore located upon and then in the actual possession of people claiming under the Mineral Land Act, and the point was made that as to the mining locations, the parties being in possession under the alleged mining locations, although they had not made an actual discovery, the claim of those parties in possession was good as against the scrippers. And that turned upon a construction of the Forest Reserve Act. Under that Act of Congress it seems by deeding back to the United States patented land that you own within the forest reserves, you were given the right to file elsewhere upon *vacant* government land and upon an equal area thereof. And we will contend that these decisions turn upon the definition of "vacant government land," and have weight in a contest between mineral land claimants, both claiming under the Mineral Land Act. Now, section 2319 of the Revised Statutes of the United States reads as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and

unsurveyed, are hereby declared to be free and open to exploration and purchase." In other words, the valuable mineral deposits belonging to the United States, or in lands belonging to the United States, are hereby declared to be free and open to exploration and purchase. The valuable mineral deposits are left free and open. There is nothing there about *vacant* land but in the Forest Reserve Act there is the word "vacant," meaning unfilled. It is true that the courts have ruled that you cannot enter upon lands in actual present physical possession—I mean actual occupancy, when a man is there with his feet or with a gun, and in range of that gun are boundaries he has marked upon the ground, that the courts have said, for the purpose of preventing bloodshed, and to have peaceable relations and avoiding a breach of the peace that you cannot enter. We contend that we may enter where there has been an invalid location, provided it is not then in the actual physical present occupancy of anyone, if a man is not there with his feet or armed force, that we may enter, and if we make a valid location upon the ground that he claims, and his claim being invalid, that the courts will sustain our entry.

We will contend at the time the entry was made by Mr. Miller upon this land, (December 31st) that the land had been theretofore located and claimed by other parties and was not vacant within the contention that will be made by the

other side, but that there was a valid existing location upon the date that he (Miller) made his claim.

The facts with reference to the Miller location are these: On the 29th day of December of the year 1896, Mr. Miller being at Visalia, wrote an abandonment of a previous location of the same 160 acres of land that is in litigation in this suit. He acknowledged that written abandonment on the 29th day of December of that year, and at 3 p. m. on the 31st day of December of the same year that abandonment was recorded in the county records of Fresno county, that being the county wherein this 160 acres is situated. Now, Mr. Miller claimed the right to make that abandonment upon this state of facts: It seems that in 1895 in June a man named Barieau and seven others filed and posted a notice of location upon this same 160 acres of land. Thereafter he went upon the land with a surveyor and they monumented the 160 acres of land, and Barieau testifies that he discovered oil, that oil was seeping from the ground in connection with water from a spring; that it was in the middle of the section of land, and we contend that made a complete and absolute segregation of vacant public land, the land theretofore having been vacant and unappropriated and that it was a complete location. Those facts are undenied. There is nothing in the case shading them. While the court has found that the

Barieau location was invalid and void, the court has found that it is invalid from no testimony whatsoever, because Barieau was not contradicted by any witness, nor was he contradicted by any circumstances. Now, we will cite your Honors to the case of Hayward v. Rogers, 62 Cal., 348 and 372; to the case of Evans v. George, 80 Ill., 51, 58; Jones v. The State, 48 Ga., 163; and we also cite Secs. 1844 and 1847; 2061, sub. 1, and 2103 of the Code of Civil Procedure, to the effect that where there is evidence that is undisputed, that the court cannot find adverse to that testimony, that the court cannot impeach the witness; that the presumption of innocence goes with the witness, and there are no circumstances here that would justify the court in making a finding of that kind, and we have attacked the finding. And furthermore, the court in other matters, in other particulars, and in other findings in this case, has set aside the undisputed evidence of other witnesses, and has found against the undisputed testimony, and we wish to cite the authorities just mentioned upon that proposition, that it is not within the province of the trial court to utterly disregard the testimony of a witness who is not impeached and where there is no testimony to the contrary. Mr. Miller testified that he was an attorney at law, and that he had been such for a great number of years. He says that he received deeds through a certain corporation called the Oil Producers Asso-

ciation for six of the titles of these eight men who made what we have and will call the Barieau location. In other words the title of seven of those men was joined in Miller by a quit claim deed on this 29th day of December, at the date he made this abandonment. The abandonment was recorded by Judge Harris in Fresno at 3 o'clock in the afternoon of the 31st of December. On the *forenoon* of that same 31st day of December, Mr. Miller went upon this very ground before the recording and made this re-location. Now, we will contend that that was a void re-location because of the Barieau location, and because the abandonment was not at that hour yet recorded. But, furthermore, there was one of that association—one of the eight—who had not signed the abandonment, and his title had not vested in Miller. He could not abandon or destroy the title of the man holding that eighth.

Therefore Miller only acted for seven, and he could not segregate the other eighth, it being an association location, and until the last minute of the last day of that year—of that calendar year—that title remained, and it was not possible for Mr. Miller to segregate one-eighth from the other eighths. He could advertise him out as provided by Congress but not otherwise. Furthermore, Mr. Miller's location either took effect from the time that he *acknowledged* that abandonment on the 29th of December, or the abandonment took effect from the *recording* thereof on the

31st day of December. If it took effect on the 29th then the testimony shows that Barieau went on the ground on the 30th day of December and for the second time for him put up a new notice of location, so there were intervening rights. Either it was not abandoned by Miller until the notice was recorded—the abandonment was recorded—or else it was abandoned when it was acknowledged and put in the mails. In either horn of the dilemma, let them take which they choose, Barieau on the 30th intervened, and his new notice would hold the ground for a reasonable length of time if his first location was void. On the other hand, if the abandonment took effect at 3 o'clock in the afternoon of the 31st, then the relocation of Miller was premature and void because made on the morning of the 31st of December. Now, your Honors have passed on that proposition in the case of McCann v. McMillan, 129 Cal., at page 352, and I am going to read to you from a new work on mines—Snyder on Mines—with reference to this case of McCann v. McMillan, which we think covers the right of Mr. Miller to abandon and immediately re-locate; and, furthermore, the record shows that Miller when he made this declaration of abandonment, when he wrote it and signed his name to it, having the right so to do for seven-eighths, testified that at the time he then and there prepared the notices of re-location for this same 160 acres and took them with him from Visalia to the ground

to be used, and they were used on the 31st day of December. I read from section 543 of Snyder on Mines, page 503 of Volume 1.

"As we have seen, forfeiture, or loss by abandonment, requires a union, or joint operation, of act and intent, and is generally a question of fact. But the mere fact of the owners in going upon a mining claim and announcing to each other that it is their intention to abandon it, and that they do thereby abandon, whereupon they immediately, without leaving the ground, attempt a re-location in the name of a third person, not present or taking any part, does not constitute an abandonment of the claim; and a re-location so made is invalid for the reason that the ground was not at that time open to re-location."

Snyder on Mines, Sec. 543, Vol. 1.

Snyder cites McCann v. McMillan, 129 Cal., as authority for the proposition. That is how your decision is construed by the text writers, and of course your Honors have in mind your own construction in the case of McCann v. McMillan. McCann and McMillan went upon a certain piece of ground which they had received a deed for from a prior location. They went there about the 27th or 28th day of December; they went over the ground and they testified, and it is uncontradicted, that looking at the ground there was mineral there, but it would require a heavy and expensive plant and they concluded, being poor men, that

they could not put up the necessary money and work to properly equip, plant and work the ground; they could not plant it, so it was useless for them and it would be ill-advised for them to do the assessment work as required by law. Thereupon they went off to another part of the claims, or other claims, and came back to this ground, and they said: "This looks very good," and thereupon one of them remembered that his friend Barkley in New York wanted some of this mineral ground—Barkley being a rich man—and they posted a notice for Barkley about the 29th or 30th of December, and this court held that was not an abandonment. This court held that the abandonment was made with the intent to defraud the United States Government out of one hundred dollars' worth of work, and it was not open to re-location upon the 30th day of December, because they could not abandon and relocate it for Barkley, and that is just what Miller tried to do. I say for those various reasons the ground was not open for Mr. Miller, even if it was open to other people. Miller came there and relocated something he did not intend to abandon. He only pretended to abandon, and was endeavoring to avoid the one hundred dollars' worth of annual labor, and we think this court will find that the Miller location was not a location made in good faith.

Furthermore, all that Miller did on the 31st day of December was to go there and post a

notice, and he did testify he monumented the claims, although that was contradicted, that he did put up monuments at each corner of the 160 acre tract on that day, and the court so found, and inasmuch as there was a conflict in the testimony, we cannot dispute but that the ground was monumented and that the notice was posted and recorded on December 31st, 1896, as prescribed by the State statute at that time. After putting up this notice and the monuments on December 31st, Miller returned to Visalia leaving no one in charge and did not return for months. Now then, it is an undisputed fact that Mr. Miller did not make a discovery at that time nor prior thereto, and that he did not know that the ground contained mineral. Thereafter, and on the first day of the following January (1897) the Chrisman locations were made. Now, it is undisputed that in July of the following year of 1897, Miller became possessed by quit-claim deed of the rights of the other seven of this association of eight people who made the Miller re-location December 31st, 1896.

MR. CORY. Grant deed, not quit-claim.

MR. METSON. Made bargain and sale deed in form, we will say, the fee being in the United States of this seven-eighths of the 160 acre tract. That brings us up to another proposition. If your Honors will bear it in mind, that was in July, and still no discovery. Miller said he did not know of any mineral upon that ground; there

were to him no indications of mineral. In September Miller made a lease to one Barrett, and in December the sub-lease (of Barrett)—the Home Oil Company—did discover oil. The uncontradicted evidence is that from the 31st day of December, 1896, all through the year of 1897, there was no discovery of oil, no discovery of mineral as to or under the Miller re-location, until December. Now, that brings the court to this proposition: Can eight men associate themselves together for the purpose of segregating a portion of the public domain therefrom, or take 160 acres, the maximum limit allowed by the United States laws, and having gotten their association together, go out and put monuments upon a piece of ground, and post a notice upon that ground, and there be no discovery of minerals and acquire any rights?

I want to read to your Honors to refresh your minds upon that proposition from Section 2320 of the Revised Statutes of the United States: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, * * * or other valuable deposits, heretofore located, shall be governed * * * A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal * * * * * but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Now, eight men at-

tempt to locate a vein of quartz; they think they know where a vein of quartz exists, but they make no investigation demonstrating or proving what there is. They go there and segregate it by building a fence around it. They carve out 1500 feet by 600 feet. They may build a stone wall around it but can they get by that provision of the statute, "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located?" Now then, before any discovery is made seven of those men under a placer location convey to the other one of the eight, and the same provision applies to placers as to lodes that there must be a discovery of the mineral. We have Miller in December, 1897, claiming *160* acres of land when the statute says, 2331, he can only claim *twenty*. Gird v. Cal. Oil Co., 60 Fed. 541. I think that is what it resolves itself to, and that is the question that your Honors have got to decide in this case. Section 2331 of the Revised Statutes reads: "Where placer claims are upon unsurveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer

claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands." The preceding section is: "But no location of a placer claim made after the 9th day of July, 1870, shall exceed 160 acres for any one person or association of persons, which location shall conform to the United States surveys, etc." Now, we understand that that has been construed to mean just what it says, by the Land Office. The foregoing provisions of law are construed to mean after the 9th day of July, 1870, no location of a placer claim can be made to exceed 160 acres, whatever may be the number associated together, and no individual can take more than 20 acres. Now, Miller in December, '97, first acquired the right to locate that ground, because a right can be acquired only by discovery, and admittedly no discovery was made by or under him until December of 1897. Now that is the situation. I cannot find any cases upon it, but it seems to me, reasoning from the statute, where the statute says discovery is the inception of a man's rights, and reading the statute which says that 160 acres can be taken by eight, and that twenty acres can be taken by one, that Miller and his seven associates were but as one in December, '97, because they had all conveyed to him before discovery and that he is claiming and trying to support a 160 acre location under a discovery made by one man—under a location made by one man. And we claim

that in this case that the location of 160 acres Dec. 31, '96, by Miller is absolutely void. He would be entitled to claim only one twenty acre tract but which one of the eight 20-acre tracts? How is the court going to lay out that one twenty acre tract? Is it going to take the well as an axis?

MR. JUSTICE McFARLAND. You mean 20 acres of land. You don't mean 120?

MR. METSON. Yes sir, 20. Is he going to take that well as the hub and swing around the circle like the spokes of a wheel?

MR. JUSTICE McFARLAND. If the location is made before discovery, but discovery is made before the rights of any other parties intervene, you claim still the location is void?

MR. METSON. No sir.

MR. JUSTICE HENSHAW. Dates from the time of the discovery.

MR. METSON. It would. All the preceding acts, monumenting and posting notice would be drawn down to the discovery. That is the date that it is segregated from the public domain. That is the location.

MR. JUSTICE McFARLAND. Your proposition is this, that the conveyance of these other seven to Miller before discovery was made amounted to nothing, they had nothing to convey?

MR. METSON. That is our proposition; yes sir. They had nothing they could convey, and if

they did have the right to convey, that the association then terminated by the conveyance. That was the division of the partnership; that was an accounting; that thereafter it was one individual, and he could only claim twenty acres by a proper location, and having attempted to locate 160 acres the whole thing would be void, because the court could not segregate one twenty from another.

MR. JUSTICE HENSHAW. If the location of the eight had been valid and seven conveyed, of course Miller then would hold seven-eighths out of the 160 acres.

MR. METSON. He would have held the whole location.

MR. JUSTICE HENSHAW. Seven-eighths.

MR. METSON. In the second Miller location he (Miller) was one of the eight. In the first (Barrieau) location Miller only had seven-eighths he could control.

MR. JUSTICE HENSHAW. Having abandoned that location, if his abandonment amounted to anything, then when he re-located he could only re-locate for twenty acres. That is your proposition?

MR. METSON. Yes sir, in the way this was done or rather attempted to be done. Under the Barieau location made in 1895 there are eight men. That was a valid location. When completed they had a right to convey. We contend that was a valid location and they had a right

to convey. But in discussing this question of abandonment and the discovery in Dec. '97 we want to keep in mind that there were two association locations attempted one by Barrieau and one by Miller.

MR. JUSTICE McFARLAND. You first claim this location of Miller was void?

MR. METSON. Yes sir.

MR. JUSTICE McFARLAND. Passing that. Suppose Miller's and the other seven was a good location, provided mineral had been discovered then you claim that notwithstanding it being good, if discovery had been made before a conveyance, yet as the discovery was not made before the conveyance, that the conveyance of the other seven conveyed nothing?

MR. METSON. Yes sir, and that when the discovery was made it only entitled him to twenty acres. Then he could have made a re-location of twenty acres, but could not revert a year back to the 31st day of December, '96, and claim 160. Then he as an individual would have to remonument and stake out his 20 acres. I think we admit there can be no valid location, unless the boundaries are distinctly marked upon the ground. That has been agreed to in the briefs of both parties, and there can be no valid location without discovery. I want to read, to refresh your minds, a citation from Erhardt *v.* Boaro, 113 U. S. 537, where it says: "A mere posting of a notice on a ridge of rocks cropping out of

the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not of itself initiate any right." I contend that all that was done here was the posting of a notice and marking of the ground, without a discovery, on the 31st day of December, 1896. But "there must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence." Now then I want to suggest to your Honors that the testimony further shows that the Miller location made by him on December 31st, 1897, by the posting of a notice, with the names of eight people on it, was in effect a dummy proposition.

MR. HARRIS. December, 1896.

MR. METSON. Yes, December, 1896, is correct. Eight names, and only two or three *bona fide* locators. The record shows that, and, therefore, the Miller location was void.

MR. CORY. The finding of the court is against you on that.

MR. METSON. Yes sir, and I say there was no dispute in the testimony upon these various propositions, and I cite your Honors to Section

450, Vol. 1 of Lindley upon the question of dummy locators.

On the first day of January of the year 1897, the defendants Chrismans went upon the claim. They went upon the lower part of this 160 acres in dispute. It is undisputed that they put up monuments and posted notices, and the court finds that they did. They claim twenty acres each. They both testified and other witnesses testified that they discovered oil at that time, that they found oil there before, knew it was there and they go on and state they at that time did certain work, and thereafter that they did certain work. The court finds there were no discoveries of oil, and the court finds upon this sort of testimony that two or three years after this location was made by Chrisman that certain people went there and examined the ground, examined the excavations there and that they did not at the time of examination find indications of oil. I submit that that is an unjust finding. In other words there was some negative testimony by these men who said they did not years after see oil. They went there after the surface of the ground had been disturbed, where the oil had been. These same men testified on the trial that when oil reaches the air it disintegrates. (Trans. f. 521, p. 174.) It passes off by being disintegrated by water, and it makes certain rainbow colors upon water, and these witnesses testified there were springs upon

this land and oil came out with the water from the spring and that there was oil there on the first day of January, 1897, the date when Chrismans made these various locations. Our contention is, and the record shows it, that all surrounding this 160 acres, and within the 160 acres of land in dispute, and prior to the time this examination was made, that there numerous oil wells had been opened. It is demonstrated that these various oil wells and openings relieved the pressure upon the oil and gas in the earth, and that naturally the oil would not exude as it had through the springs at the time the Chrismans made their locations, and they testified positively to the discovery of the oil. They testified positively to bottling the oil and taking the oil away from there, and other witnesses testified to that. And we will contend and do contend to this court that there was an actual discovery, and as an evidentiary standpoint there is no conflict here in the evidence, and that the finding of the court was wrong.

Irrespective of whether we have a good title or a bad title, if our title be weak, they have got to recover upon the strength of their own title in this case, and if we destroy their location, if we make any one of these propositions successfully to this court, then the case should be reversed. We think that is about all that we want to say upon the opening, except that we have been written to on behalf of the intervenor in this case. Their

case is fully set up in their briefs. They asked us to state to the court that their proposition was based on facts like these; that they contended that Miller had no right to abandon the first Barieau location made in 1895 because there were but seven-eighths vested in him. They contend Miller's location of Dec. 31st, '96, was made by dummies, and Miller had located the ground as school land; attempted to buy it as school land, and had a homestead application filed on it, and he was determined to get that ground in some way, and he did not intend to abandon in good faith; that the Miller location never was attempted to be made in good faith, and that no discovery of oil was made until December, '97; and then it seems after December the intervenors in this case—the other parties (Millers not having taken advantage of the discovery made, base their location on the two 20 acre tracts; that they intervene for—or forty acres—they made their (intervenors') discovery upon oil exuding from the well sunk by Miller or Miller's lessees, and located before Miller or his lessees did. They contend that inasmuch as Miller never made a valid location of the 160 acres, inasmuch as the conveyance from his seven partners to him was made in July and discovered oil afterwards, that they had as much right to claim the discovery of oil made by the well bored by Miller or his lessees as the other parties, having waited a reasonable time for Miller or his lessees to re-

locate under the oil discovered flowing from this well. That is the situation as I understand it. I also want to cite to your Honors Mr. Lindley on the question, and some other cases. I want to call your Honors' attention to Sections 218 and 219 of Lindley, Vol. 1, upon the proposition that we had the right to enter within Miller's monuments granting that he made it on the 31st day of December, '96, and had a right to locate on the first day of January. That is one of the points, and we want to contend this, that the courts of the western slope have been dealing with words of children, that they have been taking up the time of litigants, that lawyers have been stealing the money that they received as fees if the argument be made to the court and sustained that a man can go upon a piece of ground and put up a notice and can hold that ground forever until the United States intervenes,—we claim that the decisions of this court are undisputed that if a man goes upon and makes a location or attempted location, if he monuments a piece of ground without discovery, and any reasonable length of time having elapsed, and he not being in actual possession, that then I have the right to go there and relocate the ground having made a discovery. In fact I have a right to prospect the same ground as long as I can do it peaceably, and if I make discovery first that that is the initiation of rights. For instance this court in the 66th Pacific Reporter in this

case of Tuolumne Consolidated Mining Co. v. Maier held this: There was a mineral location we will say in 1896, by the posting of notice and monumenting a claim—quartz lode; no discovery admittedly; and the court held that there was no discovery. Now a man builds a ditch across that claim, subsequent to monumenting of it, but prior to discovery. After discovery is made the owner of the claim brings ejectment against the owner of this ditch, and the court holds that it was government land; that it was open to everybody until the discovery was made. Is it to be now demonstrated that courts have been dealing and using the words—"intervening rights"—and dealing with subsequent locators and their rights ill-advisedly. It is startling to me. It is startling how the western courts, State and Federal, have been passing upon these matters right straight along since the act of 1872 down to the present time, and that we are now to discover that until the United States intervenes that no man can question a notice posted upon the ground. If they can't question the notice that is posted upon the ground they cannot question the size of the claim. The decision in Cosmopolitan v. Foot (?) 101 Federal p. 518 where the court carved 900 feet off the claim because the lode ran across the claim instead of running lengthwise, and other decisions where claims that were over 1500 feet in length were cut down so as to make it conform to the

statute, might just as well be looked upon as babbling. One might just as well post a notice and take the site of Oakland as one end of a mining claim and put the other one as the other monument at San Diego, and claim everything intervening, and wait until the United States interferes. See Sec. 218, 219 Lindley, Belk v. Meagher, 104 U. S. 284, Burns v. Clark, 66 Pac. R. p. 12.

MR. JUSTICE McFARLAND. You appear for the intervenor too?

MR. METSON. No. I just make this statement at their request.

MR. JUSTICE McFARLAND. It does not seem to me the intervenor had any right. He went right on the claim after the other man had developed it and sunk a shaft, and the first man that ever showed there was any oil there, he goes there and locates their works and everything else.

MR. CORY. Does it in the night time also.

MR. METSON. The testimony shows he posted the notice in the night time and monumented it in the day time, and was then run off with a gun. But the point they make is this, that the other people, if they made a discovery, that they could have located within a reasonable time by doing the other acts necessary to complete a valid location. That is their point, and inasmuch as they did not do it, the intervenor had the right to locate. But their briefs are

full. There are a great many other points in the case that I do not want this court to understand we waive in this matter, for they are fully argued in the briefs.

## CLOSING ARGUMENT.

MR. METSON. May it please the Court, I want to read here Mr. Canfield's testimony, the Home Oil Company's manager and president: "There have been improvements on these two 20 acre tracts; there is some road built, a derrick there, two houses built and some other buildings placed on the same. I don't know, but suppose Mr. Chrisman put them there." (Folio 332, tr. p. 111.) Chrisman testified he put up buildings, sunk shafts, run tunnels there, and a number of other witnesses saw the excavations made by the Chrismans. Mr. Canfield testifies there was no work done there since Barrett did some work in 1896 upon that claim except that done by the Home Oil Company, and the Home Oil Company did the work under a lease, and the lease was in September, 1897. (See p. 110, tr. folio 328.) Miller testifies: "In the year 1897 there was considerable work done upon this quarter section, and among other things there was an oil well completed during that year. I think the work commenced sometime in the summer of 1897. There were also some roads built, a derrick erected, oil well casing purchased, a well drilled about 700 feet deep and completed,

which yielded and flowed oil during that year. The value of the work done in 1897 was from $3000 to $6000. All of this work was done by the Home Oil Company as my lessees." (P. 75 tr., folio 225.) The lease was made September 17, 1897, (folio 227, p. 76). The point is made that there is no testimony in this record as to when oil was discovered and there is the testimony of Mr. Miller. I read from page 75. That does not give the date but the lease does. It says the work was done by the Home Oil Company, and Mr. Canfield swears no work was done except by Mr. Barrett in 1896, and it is surprising to me to think that when we attack a finding upon the ground that the evidence does not support it, that because there is no evidence, therefore, the finding must stand. The finding stands because it is their evidence or *no evidence*. That is new law to me. In other words, if discovery under the statute is the inception of location and must exist, because plaintiffs do not show it in the evidence and a judgment is for the plaintiff, therefore the judgment must be supported in this court—that is a novel proposition. Now then, I want to read to your Honors hurriedly from page 122, from the testimony of Mr. Barieau. They said there was no discovery to support the Barieau location. "I saw some indications of oil on this northeast quarter in 1895," etc. "It floats on the water there" (Reading). I admit that locations of oil does not control, any more

than indications of gold. I say oil is oil, however. Barieau says he actually saw the oil. I say, furthermore, and invoking the doctrine of this court in Conway v. Hart in 129 Cal.,—this court in that case supported the judgment that was obtained by plaintiff in the lower court simply because some of the witnesses testified as to a ledge, not a mineral bearing ledge; said there was a ledge at certain points, and because there was a shaft which was bisected by two locations, part of the shaft being cut by the end line of one location and part of the shaft cut by the end line of another location, still the court, speaking through Judge McFarland, says that the question of mineral could have been put out of dispute by asking any witness the direct question, and overruled the defendant's protest because of the fact that the dump from that shaft contained gold rock and therefore supported the location; concluding from that, because there was gold taken from the ledge in the shaft, although that shaft was bisected by two claims, and a ledge running from there on, that therefore the ledge would carry gold, although there was no direct proof as to which location this gold came from. We think the court ought to be consistent, and we think that if there is some mineral or some metal such as will lead the proprietor on to further exploration to a further investment of time, labor or money, that that is a sufficient discovery. (Book v. Judice, 58 Fed., 106).

I think personally there has been too much legislation by courts with reference to the statutes of Congress, and I do not ask the court to legislate in the matter, but we simply claim that oil is oil, and not an indication. Now, Barieau says this is in 1895. He says: "Was close to the east line, close to the southeast corner. The place where I saw the indications of oil is about ten chains north from the southeast corner, and about five or ten feet inside the section line; it comes out with the water, floats on the water. There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it, run the line. There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil; not much water. It was a narrow gulch." He says there was oil. I say that oil is more than an indication of oil. This bears the relation that gravel in a stream carrying gold is moved along that stream in time of freshet. That gold in the moving gravel if found would be the inception of a placer mining location; and so it would be here. This man found oil, and that is what he was looking for, and I maintain under the decisions of this court shall sustain it

as a proper discovery. There was no conflict about that. After these excavations were made by Chrisman, after they had sunk shafts and ran cuts and made tunnels, and two years after the location, after the discovery is claimed by them this ground was examined by experts—and the court knows what experts are. After the ground had been opened up by various wells and oil had been pumped, after the pressure from beneath had been relieved, after the surface oil had been covered or disintegrated by the elements, I say that it is not sufficient to raise a conflict because one man swears positively he saw a thing; takes oil in a bottle and carries it off; has it tested and determined to be oil; because another man comes there two or three years afterwards and he does not find oil that he can see, that that is not sufficient to invalidate the location. The 65 Pacific Reporter, 875 cited by counsel is a case I have not read, but that is in direct conflict with McCann v. McMillan, 129 California, and Tuolumme Con. M. Co. v. Maier, 66 Pac. Rep. 863-864. In McCann v. McMillan the McMillan location was held invalid because of the showing that the ground was not vacant public land re-located for Barclay. Why? Because this court held that Calm and McMillan could not abandon the location theretofore existing and McCann did not seek to connect himself with the source of title—McCann did not seek to connect himself

with the prior location, but McCann showed the prior location and showed that the abandonment was void, and that was the reason McMillan lost in that case, (Gwellam v. Donellan, 115 U. S, at p. 50, last half page. Sec. 354 Vol. 1, Snyder on Mines.)

I submit all of the authorities mean that until the last minute of the last day of the year there having been a valid location theretofore that the ground has been segregated from the public domain, and remains until time for doing annual labor has expired. In other words, it is not government land; the mineral deposited therein is not subject to exploration and the land to occupation and purchase, and in order to support a location they have got to show it was not held under a valid location not forfeited for want of assessment work.

Lockhart v. Johnson, 21 Sup. Ct. Rep., p. 669–670.

Fisher v. Seymour, 49 Pac. 30–33, 5th P. Syllabus.

As to citizenship, I submit the citizenship question has been determined. It has been determined by the Supreme Court of the United States. It has already been demonstrated in this work that only public mineral lands of the United States are open to location and purchase under the laws of Congress and the state laws in subordination thereto.

Snyder on Mines, Sec. 279, Vol. 1, p. 243.

It must be quite apparent that where the land,

even though otherwise public mineral land, is covered by a valid subsisting location it is not open to exploration and purchase and therefore no valid discovery or location can be made upon it; *a fortiori* that the settled rule is that a location to be made must be good when made.

Sec. 156, p. 130, Vol. 1, Snyder on Mines.
Citing Omar v. Soper, 11 Colo., 389;
Belk v. Meagher, 104 U. S., 279, and California cases.

It has been determined by the United States Circuit Court of Appeals. I admit that question has been one that has been decided differently in a great many courts, but I submit that the Melsing case in the United States Circuit Court of Appeals decided that.

THE CHIEF JUSTICE. Has that question ever been decided in the Supreme Court of the United States?

MR. METSON. Yes sir. Manuel v. Wolf, 152 United States Reports, and followed in Tornanses v. Melsing. Finally by McKinley v. Alaska, 183 U. S., 563. I submit the citizenship question is out of this case. Furthermore, it can only be questioned by the Government in cases involving a patent application. If this was a patent contest then a man would have to show he was a citizen; to be a good patent must show he is a citizen, and it has been held, if he declares his intention just before the trial, or during the trial, that it is sufficient.

Now I want to say, furthermore, with reference to the Barieau location—I mean the first Barieau location of 1895, that the doctrine is whatever is done for a man's benefit is presumed to have been ratified or authorized, and I cite Lindley on that—agency exists—Section 331, Vol. 1 of Lindley, and that citizenship is presumed. Furthermore, the authorities agree upon that proposition. I submit that under the Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S., we have the right to enter upon patented ground as long as we do it peaceably, so long as we do it without fraud and without force, we have the right to enter upon the patented location of another man for the purpose of putting posts there and monuments there and making our end lines parallel, and I think that is the last decision upon the subject. Again I quote from Judge Ross in the Nevada Sierra Oil Co. v. Home Oil Co. in 98 Federal Reporter, 673: "It is true that upon mineral lands of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself."

There have been many briefs filed in this case. Several gentlemen appear here as friends of the court and they have filed many pages. They don't want certain questions decided. Why?

We submit that the plaintiff has got to make

out a case. We have attacked the plaintiff's case in every point that we deem vulnerable. That counsel do not rely upon the abandonment of the first Barieau location I never heard of before. They rely upon it in their briefs. They did not until today so express themselves, but if they do not, Barieau upon the 30th of December, '96, one day before Miller went there, posted a new notice, or re-location of this same ground, therefore he (Barieau) was ahead of Miller, and the ground was not open for re-location by Miller on the 31st. Barieau posted that location on the 30th day of December. If the abandonment proposition is not supported, if they do not stand upon that it is in the record that Barieau posted a notice there on the 30th day of December, '96. A copy of the notice is in the transcript and it was put on record. He recorded it, as in Newbill v. Thurston, and he had a reasonable time within which to examine his claim and the ground was not open to re-location by Mr. Miller. Furthermore, grant this is valuable ground and ground that the Home Oil Company did expend money there, I submit the testimony shows they have been extracting this oil. They have been getting a revenue therefrom. I submit they were well advised as far as the law gives recognition of the defendants' rights so far as there was anything incumbent upon defendants to do it was done by monumenting those claims on the first day of January, '97, the next day after the Miller loca-

tion. It was done by posting notices and recording them. Our people went into and were in the actual possession; they were making excavations there; they built houses there, and if the Home Oil Company—if diamonds and diamonds a mile deep were there it cannot be urged against us. We may be poor men and unable to put up a plant such as rich men could. That should not be raised in oral argument, and should not be put in the briefs as it has been. We have acted in good faith. We understand counsel on the other side have. We claim the equities are equal; that is, we claimed something that we thought we were entitled to, and we believe that whether the ground is rich or poor or when they after that placed a plant there according to their means, or whether these defendants have a plant in accordance with their means, that we should get equal justice from this court, and we know we will.

IN THE

# SUPREME COURT

OF THE

STATE OF CALIFORNIA.

S. F. No. 2242.

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MILLER,
*Respondent,*

*vs.*

CHRISMAN ET AL.,
*Appellants.*

ON APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF FRESNO.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an argument filed March 3, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 15th day of February, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By OSCAR A. TOLLE, *Deputy*.